

**A Dewith B Gambut @ Gombot v Lawrensius Aloysius
 as ACLR & Anor**

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO
K24-209 OF 2002

B IAN CHIN J
10 FEBRUARY 2003

Administrative Law — Exercise of administrative powers — Land acquisition — Whether a chief minister could change the decision of a previous chief minister whose decision was not implemented

C Land Law — Acquisition of land — Acquisition by state authority — Residents of Kg Pulau Penampang in occupation of state land due to encouragement of chief ministers — Whether residents of Kg Pulau Penampang could be evicted

D The plaintiffs, the residents of Kampung Pulau Penampang, sued the assistant collector of land revenue and the Government of the State of Sabah for the following declarations: (1) that the eviction letter dated 29 April 2002 issued against them is null and void; (2) that the 30 acres site on which Kampung Pulau Penampang is situated is an approved kampung reserve and be gazetted; and (3) that the residents of Kampung Pulau Penampang have a legitimate expectation and are entitled to a peaceful and quiet enjoyment of the kampung reserve. There are currently 101 houses in the area and the plaintiffs have been in occupation of the land for a long period of time with the encouragement of certain quarters. There have been several chief ministers who had either expressly supported and directed that Kg Pulau Penampang be gazetted or who had not decided otherwise until the chief ministership of Datuk Osu Sukam. The question before the court was could a chief minister change the decision of a previous chief minister whose decision was not implemented since the legal process of gazetting and of obtaining the approval of His Excellency the Yang di-Pertua Negeri of Sabah was not done.

G Held, declining to make the declarations prayed for but declaring the letter dated 29 April 2002 as not valid:

H (1) The residents there had been encouraged to be there by a former chief minister, who, after he left office, also canvassed for the water supply to be connected to this kampung. He also procured an agreement to have electricity supplied to them. There were also the acts of appointing the 'ketua kampung', a fact not disputed though the official appointment letter was not produced (see p 224C-D).

I (2) It was conceded that the successive chief minister can change the policy of his predecessor, but such a power would be illusory if the change could not be carried out. It cannot be carried out if the

residents are allowed to continue to stay there and therefore renders the power to change a policy illusory (see p 224E).

- (3) The solution lay in compensating whatever rights the residents had acquired as a result of the action of the previous chief ministers. Their rights are only to compensation but not to remain on the land because the Land Ordinance does not recognize such a right, though equity recognizes such (see p 224F–G).
- (4) The court declined to make the declarations prayed for but declared that the letter dated 29 April 2002 which sought to evict the residents of Kg Pulau Penampang from the land as being not valid because there was no offer to pay compensation to the residents for the expenses they have been put to in building their houses on their land (see p 224H).
- (5) The State Government brought about this affair by encouraging the residents to move to Kg Pulau Penampang and to build thereon. They cannot simply turn the residents out. They must be held to account for the past actions of the said chief ministers. The residents can only be evicted after they have been fairly compensated for the buildings that they have erected (see pp 224H–225A).

[Bahasa Malaysia summary]

Plaintif-plaintif, penghuni-penghuni Kg Pulau Penampang, telah menyaman penolong pemungut hasil tanah dan Kerajaan Negeri Sabah untuk deklarasi-deklarasi berikut: (1) bahawa surat usiran bertarikh 29 April 2002 yang dikeluarkan terhadap mereka adalah batal dan tidak sah; (2) bahawa tanah seluas 30 ekar di mana Kg Pulau Penampang terletak adalah tanah rizab kampung yang diluluskan dan diwartakan; dan (3) penghuni-penghuni Kg Pulau Penampang mempunyai jangkaan sah dan berhak menikmati ketenteraman dan ketenangan rizab kampung. Kini terdapat 101 buah rumah di kawasan tersebut dan plaintiff-plaintif telah lama menghuni tanah tersebut dengan galakan pihak-pihak tertentu. Terdapat beberapa orang ketua menteri yang sama ada telah nyata menyokong dan mengarah supaya Kg Pulau Penampang diwartakan atau belum memutuskan sebaliknya sehinggalah Datuk Osu Sukam menjadi ketua menteri. Soalan di hadapan mahkamah adalah sama ada seseorang ketua menteri dapat menukar keputusan ketua menteri terdahulu yang belum dikuatkuasakan memandangkan bahawa proses undang-undangewartakan dan untuk memperolehi kelulusan Tuan Yang Terutama Yang di-Pertua Negeri Sabah belum dilakukan.

Diputuskan, enggan membuat deklarasi yang dipohon tetapi membuat deklarasi bahawa surat bertarikh 29 April 2002 tidak sah:

- (1) Penghuni-penghuni telah digalakkan untuk menghuni tanah tersebut oleh seorang ketua menteri terdahulu, yang, setelah

- A** menamatkan perkhidmatan beliau, juga telah merayu supaya bekalan air dibekalkan kepada kampung ini. Beliau juga telah mendapatkan suatu perjanjian untuk membekalkan bekalan elektrik untuk mereka. Terdapat juga perlantikan ketua kampung, fakta yang tidak dipertikaikan walaupun surat rasmi perlantikan tersebut tidak dikemukakan (lihat ms 224C–D).
- B** (2) Ia telah dilakukan bahawa ketua menteri berikutnya boleh menukar polisi ketua menteri sebelum beliau, tetapi kuasa sebegitu hanya illusi jika penukaran tidak dapat dikuatkuasakan. Ia tidak dapat dikuatkuasakan jika penghuni-penghuni dibenarkan menghuni di sana dan oleh itu ini membuatkan kuasa untuk menukar polisi suatu illusi (lihat ms 224E).
- C** (3) Penyelesaian adalah dengan memberi pampasan kepada hak-hak yang diperolehi penghuni-penghuni akibat tindakan-tindakan ketua-ketua menteri terdahulu. Mereka hanya berhak mendapatkan pampasan dan bukan untuk menghuni di atas tanah tersebut kerana Ordinan Tanah tidak mengiktirafkan hak sedemikian, walaupun ia diiktirafkan oleh ekuiti (lihat ms 224F–G).
- D** (4) Mahkamah enggan membuat deklarasi-deklarasi yang dipohon tetapi telah membuat deklarasi bahawa surat yang bertarikh 29 April 2002 yang berniat mengusir penghuni-penghuni Kg Pulau Penampang dari tanah tersebut adalah tidak sah kerana tiada tawaran untuk membayar pampasan kepada penghuni-penghuni untuk perbelanjaan untuk membina rumah-rumah mereka di atas tanah tersebut (lihat ms 224H).
- E** (5) Kerajaan Negeri memulakan perkara ini dengan menggalakkan penghuni-penghuni untuk pindah ke Kg Pulau Penampang dan untuk membina di atas tanah tersebut. Kerajaan Negeri tidak boleh mengusir penghuni-penghuni dari tanah tersebut. Kerajaan Negeri mesti bertanggungjawab untuk tindakan-tindakan ketua-ketua menteri. Penghuni-penghuni boleh diusir setelah diberi pampasan yang wajar untuk bangunan-bangunan yang dibina (lihat ms 224H–225A).
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Notes

- H** For cases on exercise of administrative powers in land acquisition matters, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue), paras 43–44.
For cases on acquisition of land by state authority, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), para 1528.

I Cases referred to

A-G of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 (refd)
Inwards & Ors v Baker [1965] 1 All ER 446 (refd)

Preston v IRC [1985] 2 All ER 327 (refd)

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Legislation referred to

Land Ordinance s 28

Datuk Douglas Primus (Lee & Thonh) for the plaintiffs.

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Mohd Bazain Idris (State Attorney-General) (*Julita Gumbil* (State Counsel) with him) (Attorney-General's Chambers) for the defendants.

Ian Chin J: The name of a village ('kampung' in Malay) has been used and referred to extensively, that is Kampung Pulau Penampang, but its existence is denied. This court is asked to resolve this enigma. Dewith B Gambut @ Gombot, for himself and for the residents of Kampung Pulau Penampang ('the plaintiffs'), is suing the assistant collector of land revenue and the Government of the State of Sabah for the following declarations:

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- (1) that the eviction letter dated 29 April 2002 issued against them is null and void;
- (2) that the 30 acres site on which Kampung Pulau Penampang is situated is an approved kampung reserve and be gazetted; and
- (3) that the residents of Kampung Pulau Penampang have a legitimate expectation and are entitled to a peaceful and quiet enjoyment of the kampung reserve.

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As of now, there are 101 houses in the surveyed area called Kampung Pulau Penampang. The area was part of the land that belonged to Zara Sdn Bhd, which land the government had acquired in 1976 for public and Federal Government purposes. The plaintiffs had all entered the land without the permission of the State Government. The State Government on 7 June 2000 decided to implement the Federal Government policy known as 'Program Perumahan Rakyat'. The policy is aimed at getting rid of illegal houses in every corner of most major towns in Sabah, to provide a decent living environment and proper housing to the less fortunate population and to achieve a squatter free target by the year 2005. The area that was targeted for this project was Kampung Pulau Penampang, and hence eviction notices were issued to the residents of that kampung. Evicting them should not pose any legal problem since they have entered upon the land without any permission of the State Government. Unfortunately, the matter is not as simple as that.

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First of the problem is the fact that these residents had been in occupation of the land for a considerable period of time with the encouragement of certain quarters. As to how long it was, it does not really matter. Even though it was disputed as to whether it was from 1985, there is no dispute that by 1995 there were 27 houses, in 1997 there were 65 houses and by 2002 there were 101 houses. Evidence was given that some of the residents came from Kg Suang Parai, Kg Bogoon and Kg Binolung,

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A which three kampungs were affected by the construction of the University of Malaysia Sabah and these folks moved to Kampung Pulau Penampang, but much later as they had initially moved to an area south of Kampung Pulau Penampang after being encouraged in May 1997 by Datuk Yong Teck Lee who was then the chief minister. By that time, there was already

B a pending land application in 1994 submitted by Philippus Servatius ('Philippus') as the Ketua Kampung of Kampung Pulau Penampang, for 60 acres of the land which included 30 acres which were subsequently surveyed. The application was apparently considered because the letter of the Assistant Collector of Land Revenue, Kota Kinabalu, dated 30 December 1994, spoke of the decision of the director of lands and surveys

C to maintain only 30 acres instead of 60 acres for gazetting it as 'Tanah Simpanan Perumahan Bumiputra Kg Pulau Penampang'. Philippus appealed to the director in February 1995 for 60 acres instead of 30 acres. This was during the time that Tun Sakaran Dandai was the chief minister and there does not appear to be any opposition from him as regards that application. Datuk Salleh Said Keruak took over the reign of chief

D minstership from Tun Sakaran Dandai, but no evidence was led as to what happened to the land application during this period. Then Datuk Yong Teck Lee took over the post of chief minister in May 1996 but there is no evidence produced as to what he did to have Kampung Pulau Penampang gazetted as a kampung reserve. It was after he had taken over that the idea of kampung contoh was either mooted or mooted earlier

E before he pursued it with zeal and this can be seen from his letter of 10 October 1996 where in approving certain land applications to the Sabah Foundation, he directed that land be set aside and houses built in this proposed kampung contoh to cater for the squatters in the area, including, to my mind, areas of Kg Pulau Penampang. Houses were then built in

F kampung contoh, but some of the plaintiffs, when asked why they did not move there, had said that the houses were of inferior quality and another said the allotted houses were occupied by someone else. The matter of the gazetting was not pursued until the chief ministership of Tan Sri Bernard Dompok in 1998 where he minuted his instruction for the gazetting of Kg Pulau Penampang. His instruction was followed through by the

G permanent secretary of natural resources when he wrote to the director of lands and surveys to prepare the draft gazette under s 28 of the Land Ordinance and to present it to his office. No evidence was led as to what happened to this instruction but obviously the gazetting was not carried out when Tan Sri Bernard Dompok left the office of the chief minister in

H early 1999. Then Datuk Osu Sukam took over and it would appear that the idea of gazetting Kg Pulau Penampang was dropped since the assistant collector of land revenue in August 2000 issued letters to the residents to vacate the land alleging they were in illegal occupation and stating also that the land is required for a local cost housing scheme. As of today, there is no communication of whatever nature as to whether there was officially

I a decision not to have Kg Pulau Penampang gazetted. It is left to be implied from the eviction letter of the assistant collector of land revenue that such is the case. So it was during this period that the project of

'Perumahan Rakyat' was decided to be implemented. Pausing here, we have successive chief ministers who had either expressly supported and directed that Kampung Pulau Penampang be gazetted or who had not decided otherwise until the chief ministership of Datuk Osu Sukam. This brings me to the first of the questions which this court must find an answer to and that is: can a chief minister change the decision of a previous chief minister whose decision was not implemented yet since the legal process of gazetting and of obtaining the approval of His Excellency the Yang di-Pertua Negeri of Sabah was not done. Datuk Douglas Primus, while conceding that it can be done, had argued that it should be done fairly and not arbitrarily, citing *Preston v IRC* [1985] 2 All ER 327 and *A-G of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346, but the facts there are entirely different. But I am in agreement with learned counsel that the residents there had been encouraged to be there by a former chief minister, who, after he left office, also canvassed for the water supply to be connected to this kampung. He also procured an agreement to have electricity supplied to them. There was also the acts of appointing Philippus as the 'ketua kampung', a fact not disputed though the official letter appointing him as such was not produced and of appointing Dewith B Gambut as the 'ketua kampung' to succeed Philippus in 2001. This encouragement led learned counsel to rely on *Inwards & Ors v Baker* [1965] 1 All ER 446 to contend that the State Government is estopped from evicting the residents. But in the present case, since it is conceded that the successive chief minister can change the policy of his predecessor, but such a power would be illusory if the change cannot be carried out. It cannot be carried out if the residents are allowed to continue to stay there and therefore renders the power to change a policy illusory. Digressing here, it was argued rather weakly that the policy of building 1,000 flats on the land there was not a good idea, but that is a policy matter which the law says the legislators are in a better position to decide. So, I will not dwell on the point. Returning to the point concerning the rights of the residents that have arisen as a result of the active encouragement of two previous chief ministers and the passive encouragement of another two with the consequence that the residents have expended money to build their houses there, the solution lies in compensating whatever rights the residents have acquired as a result of the action of the previous chief ministers. Their rights are only to compensation, not to remain on the land because the Land Ordinance does not recognize such a right, though equity recognizes such.

In the premise, I decline to make the declarations prayed for but I will declare that the letter dated 29 April 2002 which seeks to evict the residents of Kg Pulau Penampang from the land as being not valid because there was no offer to pay compensation to the residents for the expenses they have been put to in building their houses on their land. The State Government has brought about this affair by encouraging the residents to move to Kg Pulau Penampang and to build thereon. They cannot simply turn the residents out. They must be held to account for the past actions of the said chief ministers. The residents can only be evicted after they have been

A fairly compensated for the buildings that they have erected. Cost to the plaintiffs.

Declarations prayed for declined but letter dated 29 April 2002 declared not valid.

B Reported by Chew Phye Ken

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